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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 161

LIGGETT AND MYERS TOBACCO CO., PETITIONER

v.

THE UNITED STATES

No. 162

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

THE UNITED STATES

No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 20–26) is reported in 13 F. Supp. 143; 14 F. Supp. 543.

JURISDICTION

The judgments of the court below were entered April 6, 1936. (R. 26–27.) Order overruling petitioners' motions for new trial was entered June 9, 1936. (R. 27.) The petition for writs of certiorari was filed July 6, 1936 (R. 27), and was granted October 12, 1936. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the tobacco stamp tax imposed by Section 401 (a) of the Revenue Act of 1926 is a sales tax, imposing a direct burden upon a governmental instrumentality of the Commonwealth of Massachusetts.

2. Whether the Boston State Hospital is an essential governmental instrumentality of the Commonwealth of Massachusetts.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix (*infra*, pp. 29–32).

STATEMENT

The findings of fact of the Court of Claims (R. 20–22) may be summarized as follows:

On or about January 6, 1932, petitioner Liggett and Myers Tobacco Company received an order

from the Commonwealth of Massachusetts, through its purchasing agent, for the delivery of four boxes of manufactured tobacco, totaling 96 pounds net weight, to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in Boston. (R. 21.)

The established Internal Revenue practice and procedure was to affix the tobacco tax stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory. (R. 21.) The petitioner had, in its bonded warehouse, the tobacco so ordered in packages to which such stamps, duly cancelled, had been affixed. The aggregate amount of the stamps so cancelled was $17.28. (R. 21.)

Pursuant to the order received, the tobacco was delivered on or about January 19, 1932, to the Boston State Hospital, and on the date of shipment the petitioner Liggett and Myers Tobacco Co. sent a bill to the Boston State Hospital in the sum of $30.62, representing the price of the tobacco, including the tax paid by Internal Revenue stamps. This bill was paid by the Commonwealth of Massachusetts. (R. 21.) The tobacco so shipped and received by the hospital was distributed free to patients thereof under the authority of the law of Massachusetts and in the course of institutional treatment of the patients. (R. 21.)

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Insti-

tutional treatment of the insane has existed for several centuries, although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased, at public expense, has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts and performs a useful service. The power of restraining patients is conferred upon the hospital by the Commonwealth. While there are private hospitals for the care of the insane, located and operated in the Commonwealth, they are conducted for profit, and the average patients do not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not, they pay nothing. (R. 22–23.)

Claims for refund in the sum of $17.28, the amount of the stamps used in payment of the tax on the tobacco shipped to the hospital, were filed in due time and in proper form on the ground that the tax sought to be recovered was paid on tobacco sold to the Commonwealth of Massachusetts for use in an institution owned and operated by the Commonwealth as an instrumentality of government. The claims were duly rejected. (R. 22.)

Upon the foregoing findings of fact, the Court of Claims found in each of these cases, as a conclu-

sion of law, that the Hospital was not an essential governmental activity of the Commonwealth of Massachusetts, and, as such, immune from Federal tax, that petitioners were not entitled to recover, and the petitions were dismissed. (R. 22, 23.) The Court of Claims did not pass upon the issues raised in the first and third points discussed in the present brief, but these issues were again raised in the petition for certiorari.

SUMMARY OF ARGUMENT

1. The tobacco tax imposed by Section 402 (a) of the Revenue Act of 1926 does not cast any direct burden upon the transaction of sale from Liggett and Myers to the Commonwealth of Massachusetts. The tax is imposed upon tobacco manufactured and thereafter sold or removed for consumption or sale. In terms it is imposed upon the manufacturer. It is clearly a tax on the manufacturing of tobacco, postponed as to collection until either removal or sale, whichever occurs first. Since, in practice, removal precedes sale, as a practical matter payment accrues at or prior to removal from the factory. That the tax is clearly laid on manufacturing and not on the sale is evidenced not only by the plain provisions of the statute, but by the title to the Act itself, and the detailed provisions relating to the enforcement and collection of the tax, and by the administrative interpretation as revealed in the

regulations. Other taxes, substantially identical, have been definitely declared by this Court to be manufacturing taxes and not sales taxes. Since no tax was laid on the transaction with the hospital, any burden, so far as Massachusetts was concerned, was indirect and remote, and, under many decisions of this Court, the rule of immunity does not apply.

2. In any event, there is support for the decision of the court below that the maintenance and operation of the Boston State Hospital is not strictly a governmental function. Private hospitals can, and do, perform an identical function, and the rule of immunity has been held to extend only to those sovereign functions which only the State itself can do. Should this strict test be rejected, we believe, in the alternative, that only those activities in which the States have traditionally engaged are immune. Traditionally, care of the poor, including care for the indigent sick and insane, is a proper function of state government. But, traditionally, it is no part of the State's function to operate hospitals for those able to pay, in competition with private institutions. In this case those patients who were able, paid; those unable did not, but the extent of the non-charitable operations is not shown. Should this point be reached, the case should be remanded for further findings.

3. The proper party petitioner is Liggett and Myers Tobacco Company, which is the taxpayer

and the only party recognized by the pertinent statutes. Any judgment rendered against the Government should be in favor of Liggett and Myers.

ARGUMENT

I

THE TOBACCO STAMP TAX DOES NOT DIRECTLY BURDEN ANY STATE GOVERNMENTAL INSTRUMENTALITY

The question here is whether the tobacco stamp tax in the sum of $17.28 paid by the Liggett and Myers Tobacco Company upon tobacco manufactured by it and sold to the Boston State Hospital constitutes a direct burden upon an essential governmental function of the Commonwealth of Massachusetts. It is the Government's position that irrespective of whether the Boston State Hospital is a governmental instrumentality of the State, the tax in question was not laid on the transaction of sale to the hospital but on the privilege of manufacture, and that any burden on the State was, therefore, indirect and remote.

Section 401 (a) of the Revenue Act of 1926, *infra*, provides:

> Upon all tobacco and snuff *manufactured in* or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, * * * a tax of 18 cents per pound, to be

paid by the manufacturer or importer thereof. [Italics supplied.]

That the tax is an excise and not a direct tax is obvious and unquestioned. *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27. The question is upon what transaction or act is the tax laid.

It will be observed at the outset that the tax here is utterly unlike the tax involved in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. There the tax was laid on "articles sold or leased by the manufacturer." The tax was clearly laid "on the sale, and on that alone." But here the tax is not on the sale. It is on tobacco "manufactured" and afterwards sold or removed for consumption or sale. It is clearly a tax laid on the manufacture of tobacco, and postponed as to collection until the tobacco is either sold or removed from bonded warehouses for consumption or sale. The tax, being laid on a luxury and not a necessity, is large. While it was the intent of Congress to lay the tax on the manufacturer for the privilege of manufacture, in order to mitigate the burden, it has postponed the payment of the tax until the manufacturer can bring the goods into market. The tax is laid exclusively on the manufacturer or importer. It cannot be regarded as a sales tax, either as respects time of payment or measurement. It is not levied as of the time of sale, but as of the time

of removal from the factory or of sale, whichever occurs first. The tax would accrue even if a sale never occurred, as for example, if tobacco were removed for the purpose of making a gift. Nor is the tax related in any way to the selling price charged by the manufacturers. It is measured at 18 cents per pound, whether the selling price be high or low. The title to the Act itself shows that Congress intended the tax to be one on the manufacture of tobacco. Title IV of the Revenue Act of 1926 is captioned "Tax on Cigars, Tobacco, and *Manufactures* Thereof." [Italics supplied.] The sales taxes involved in the *Indian Motocycle* case are to be found under a separate and distinct title—Title VI.

Its character as a tax on manufactures is further evidenced by the detailed provisions for the enforcement of the Act, which show that Congress was looking to the manufacturer with respect to the business of manufacturing tobacco. Therein manufacturers of tobacco are defined. Act of August 27, 1894, c. 349, 28 Stat. 509, Sec. 69 (U. S. C., Title 26, Sec. 710). Every manufacturer must register with the Collector of the district. Act of October 1, 1890, c. 1244, 26 Stat. 567, Sec. 26 (U. S. C., Title 26, Sec. 711). He must file with the Collector, before commencing manufacture, a statement describing in detail the sort of manufacturing business he intends to en-

gage in. Section 3355, Revised Statutes, as amended (U. S. C., Title 26, Sec. 712). He must give a bond before undertaking the manufacturing business (Sec. 3355, *supra*; U. S. C., Title 26, Sec. 713), and obtain a certificate for the privilege (Sec. 3355, *supra*; U. S. C., Title 26, Sec. 714). His factory is given a number. Section 3357, Revised Statutes, as amended (U. S. C., Title 26, Sec. 716). He must submit an annual inventory indicating the quantity of each of the different kinds of tobacco, setting forth what tobacco was manufactured and produced by him and what was purchased from others. Section 3358, Revised Statutes (U. S. C., Title 26, Sec. 717). He must keep books and enter therein daily purchases, materials manufactured, sold, consumed or removed for consumption or sale (Sec. 3358, *supra*; U. S. C., Title 26, Sec. 718) and furnish the Collector with monthly abstracts thereof (Sec. 3358, *supra;* U. S. C., Title 26, Sec. 719). All manufactured tobacco must be put up and prepared by the manufacturer in packages of prescribed description. Section 3362, Revised Statutes, as amended (U. S. C., Title 26, Sec. 800). Stamps are required to be affixed and cancelled by the manufacturer in the mode prescribed by the Commissioner. These stamps are to be sold by the Collector "only to the manufacturers" or importers. Section 3369, Revised Statutes (U. S. C., Title 26, Sec. 803 (c)). Penalties are provided if the manufacturer fails to

register with the Collector (Sec. 3387, Revised Statutes, as amended; U. S. C., Title 26, Sec. 850); or if tobacco is removed from the factory improperly stamped (Sec. 3374, Revised Statutes, as amended; U. S. C., Title 26, Sec. 860); or if the manufacturer fails to obtain a certificate entitling him to conduct the business or otherwise fails to comply with the requirements of any of the foregoing provisions (Secs. 3355, 3356, 3358, 3364, 3370, 3372, 3456, Revised Statutes, as amended; U. S. C., Title 26, Sec. 861).

It seems clear from the foregoing that the tax was laid with reference to the privilege of conducting the manufacturing business and is merely postponed as to collection until removal or sale. Moreover, the regulations of the Treasury Department treat the tax as a tax on manufacture and not on sale. Chapter V of Regulations 8 (1928 Ed.), dealing with the subject is entitled, "Manufacturers of Tobacco." Article 3 of these Regulations provides:

> The internal revenue laws imposing taxes on tobacco, snuff, cigars, and cigarettes apply to manufactures produced anywhere within the exterior boundaries of the United States. * * *

Article 43 provides that "Such tax is imposed on all chewing and smoking tobacco, * * * prepared for sale or consumption, * * *. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid

by the manufacturer thereof by the affixing of stamps before removal." And the regulations throughout deal with the manufacturer in relation to the manufacturing process, clearly treating the statute as a tax on manufacturing. See Regulations 8, Article 33 *et seq.* And, as the court below has found as a fact (R. 21), the established internal-revenue procedure is to affix the stamps before the tobacco is removed from the factory. This established administrative treatment and understanding confirms our interpretation of the statute, and while perhaps not controlling, strengthens our contentions, drawn from the taxing provisions, that the tax is not laid on the sale but on manufacturing. *Indian Motocycle Co.* v. *United States, supra.*

This Court has held taxes similar to the one here to be true manufacturing excises. Thus in *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, a local tax was imposed requiring every manufacturer in the city to take out a license, and at a specified time to render a sworn statement of the aggregate of sales made by him during the preceding year and within a short time thereafter to pay a license tax of $1 on each $1,000 of sales made. The Court held that the tax was clearly a tax on the privilege of manufacturing and not a sales tax, using this significant language (p. 463):

> The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should

> come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. *In order to mitigate the burden,* and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, *it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market. A somewhat similar method of postponing payment has been pursued for many years by the Federal Government with respect to the internal revenue tax upon distilled spirits.* Rev. Stats., §§ 3251, 3253; Act of August 27, 1894, c. 349, § 48, 28 Stat. 509, 563. [Italics supplied.]

The Court will observe that the taxes on distilled spirits there referred to were quite similar to the tax here in question, being laid on "distilled spirits * * * that have been or that may be then or thereafter produced," and it being provided that the tax "shall be paid by the distiller of the spirits, on or before their removal from the distillery or place of storage." Act of August 27, 1894, c. 349, 28 Stat. 509, 563, Sec. 48 (U. S. C., Title 26, Sec. 1197). We submit, as in that case, the tax here is on the manufacturing, and, in order to mitigate the burden, payment has been postponed until the manufacturer can bring the goods into market.

The tax here is also plainly like the tax of one cent per pound "upon all filled cheese which shall

be manufactured * * * to be paid by the manufacturer thereof." Act of June 6, 1896, c. 337, 29 Stat. 253, Sec. 9. That statute was undoubtedly patterned after the statute here involved.[1] Stamps were provided, and "the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section." Section 9 (U. S. C., Title 26, Secs. 1001, 1011). As in this case, the statute required the affixation of the stamps at or prior to the time of the sale or removal for consumption or sale. Section 5 (U. S. C., Title 26, Secs. 1002, 1007) and Section 10 (U. S. C., Title 26, Sec. 1001). We can perceive no difference between the tax there and the tax in this case. The filled cheese tax was involved in the case of *Cornell* v. *Coyne*, 192 U. S. 418, and this Court there held that the tax was clearly laid on manufacturing. That case was relied on by the Government in the *Indian Motocycle Co.* case. This Court in the latter case said (p. 575) that the taxes involved in both *Cornell* v *Coyne, supra,* and in *American Mfg. Co.* v. *St. Louis supra,* were "distinctly imposed on manufacturing." This is tantamount to a direct holding that the instant tax is on manufacturing and not on

[1] The tobacco stamp tax in substantially the present form has been in effect for many years.

sale. See also *McCray* v. *United States,* 195 U. S. 27, and *Patton* v. *Brady,* 184 U. S. 608; *Liggett & Myers Tobacco Co.* v. *United States,* 77 F. (2d) 65 (C. C. A. 3d), certiorari denied, 296 U. S. 580; *Anargyros* v. *Edwards,* 26 F. (2d) 319 (C. C. A. 2d).

We submit that the tax in question was laid on manufacturing, the collection being postponed until removal or sale, whichever occurs first. Since removal almost invariably precedes sale, as a practical matter, the payment accrues at or prior to withdrawal, and this is the established Bureau practice.

In this view of the tax, it is clear that no direct burden is placed on the transaction of sale between Liggett and Myers Tobacco Company and the Boston State Hospital, and that the question of immunity does not arise. The tax burden was indirect because the tax was laid on the manufacturer and not on the vendee. It was not laid on the transaction of sale, but on the manufacturing operation antecedent to the sale. It had been paid by the manufacturer prior to the sale. It was "not part of the sale but preliminary to it and wholly the vendor's affair." *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, 579. The tax was a prior ordinary burden of taxation, and, like an income tax or a property tax, represented a part of the man-

ufacturing cost, and attaching to the article prior to sale, it is not retroactively invalidated merely because a sale is later made. *Cornell* v. *Coyne,* 192 U. S. 418. The vendee neither directly nor indirectly paid the tax, as a tax, but paid a fixed price which might or might not have included the full manufacturing cost of the article including the manufacturing tax thereon. Cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176.

The case is indistinguishable in principle from *Cornell* v. *Coyne,* 192 U. S. 418. There the tax on filled cheese, hereinbefore referred to, similar in all material respects to the tax here, was held to be a manufacturing tax and not to directly burden exportation, in violation of the fifth paragraph of Section 9, Article 1, of the Constitution, although the filled cheese in question was manufactured under contract for export and was in fact exported. The Court said (p. 427):

> The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.

Had the tax been laid on the sale rather than manufacture, a different conclusion would have

been reached as to goods sold in export. *Spalding & Bros.* v. *Edwards,* 262 U. S. 66; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. So here, the rule is that no burden may be cast upon the sale of articles to a State in the performance of an essential governmental function, but this does not mean that articles sold to a State are relieved from prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to sales and not to articles before sale. See also *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572; *Turpin* v. *Burgess,* 117 U. S. 504, 507; *Coe* v. *Errol,* 116 U. S. 517; *Edelman* v. *Boeing Air Transp.,* 289 U. S. 249; *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268.

This case, therefore, comes within the rule established by a long line of cases, that a non-discriminatory excise tax is not invalid because indirectly it may burden either the State or the national Government. *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Denman* v. *Slayton,* 282 U. S. 514; *United States* v. *Perkins,* 163 U. S. 625; *Snyder* v. *Bettman,* 190 U. S. 249; *Burnet* v. *A. T. Jergins Trust,* 288 U. S. 508; *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *Willcuts* v. *Bunn,* 282 U. S. 216.

The cases relied on by the petitioner are readily distinguishable. The tax in the *Indian Motocycle Co.* case, as we have said, was on motorcycles "sold

or leased by the manufacturer." It was laid "on the sale, and on that alone." It seems clear from the opinion that had the tax been similar to the one here, an opposite result would have been reached. The tax considered in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, was likewise upon the privilege of sale exclusively, and not upon some activity or condition antecedent thereto. In *Graves* v. *The Texas Company,* No. 727, October Term, 1935, decided May 18, 1936, the tax was upon the storage and withdrawal of gasoline. It was held that a tax upon anything so essential to the sale of gasoline to the United States is as objectionable as would be a tax upon the sale itself. The tax was deemed to be equivalent to the sales tax involved in the *Panhandle* case. Here, on the other hand, the tax is not upon anything essential to the sale to the State, or upon anything connected with that sale, but upon the antecedent manufacturing operations.

II

THE BOSTON STATE HOSPITAL IS NOT AN ESSENTIAL GOVERNMENTAL INSTRUMENTALITY IMMUNE FROM FEDERAL TAXATION

Conceding, *arguendo,* that the tax in question does lay a direct burden on the Boston State Hospital, there remains the question, decided by the court below, of whether the hospital is an essential governmental function of the Commonwealth of Massachusetts.

The rule of immunity is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. The reasons underlying the principal mark the limits of its range. *Indian Motocycle Co.* v. *United States,* pp. 575, 576. Since the rule is aimed at the protection of the operations of government, the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions." *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128; *Board of Trustees* v. *United States,* 289 U. S. 48. The rule is further limited by the principle that the Federal taxing power is no less essential than the powers reserved to the States, and, while preserving the latter, it is important not to cripple the former. Hence, the successful working of our dual governmental system requires that the principle of immunity be applied so as to interfere as little as possible with the important functions of Federal taxation, and therefore, the rule is to be strictly applied. *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 391.

The difficulty lies in drawing the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that

line may be plotted with precision in advance. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523.

The court below held that immunity is limited to those functions which are of "a strictly governmental character." *South Carolina* v. *United States,* 199 U. S. 437, 461. By "strictly governmental character" it thought reference was made to the operations which embody some kind of control over persons or things which can be exercised only by a sovereign power, that is, those agencies through which the state government "immediately and directly exercises its sovereign powers." *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522. The Court relied on the distinction made in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, where the Court said (p. 172):

> The true distinction is between the attempted taxation of those operations of the States *essential* to the execution of its governmental functions, and *which the State can only do itself,* and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation. [Italics supplied.]

Thus, it is the view of the court below that only the sovereign functions, that is, only those func-

tions which the State itself can do, are immune. Since there are private hospitals for the care of the insane located and operated in the State (R. 21) it concluded that the State Hospital is not immune from Federal taxation (R. 26).

While there is support for this position, it must be conceded that it has not been generally accepted by the lower courts. See, e. g., *Commissioner* v. *Sherman,* 69 F. (2d) 755 (C. C. A. 1st); *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515 (C. C. A. 2d); *Brush* v. *Commissioner,* 85 F. (2d) 32 (C. C. A. 2d), now pending in this Court on application for certiorari, No. 451, present term; *Halsey* v. *Helvering,* 75 F. (2d) 234 (App. D. C.); *Lyons* v. *Reinecke,* 10 F. (2d) 3 (C. C. A. 7th). Considerable confusion now exists as to the proper rule to be applied in these cases.

The existing doubt and confusion arises not only out of the inherent difficulties of the problem,[2] but because of what seems to us to be a clear misunderstanding of this Court's recent decision in *Helver-*

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[2] Confusion is added by the frequent recourse to those cases involving governmental liability in tort. Resort to those cases, while sometimes helpful, is dangerous and confusing, for there is much uncertainty and conflict of principle among them. This confusion should not be extended to the field of Federal taxation, where the need for uniform rules is apparent. It seems to us that there is little in common between the two lines of cases. Governmental im-

ing v. *Powers,* 293 U. S. 214. There, in holding that the operation of a street railway system was not governmental, this Court said (p. 227):

> We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the *usual* governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [Italics supplied.]

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munity in tort cases, originating in the doctrine that the king can do no wrong, largely depends upon whether the doctrine of *respondeat superior* applies; whether in the performance of public governmental duties, the officers are agents of the State or only of a particular locality; whether the powers exercised are for the benefit of the public at large or whether they are for the peculiar benefit of the particular municipality. These distinctions are not determinative of the question here of whether, judging the activity itself, the State itself, or its municipality, is engaged in that type of governmental activity which should be free from Federal taxation. It seems to us that immunity from taxation is to be governed by different and stricter rules than is immunity from suit. In any event, even in tort cases the modern tendency is against the rule of governmental non-liability. See Borchard, Governmental Liability in Tort, 34 Yale Law Journal, 1, 129, 229, 239, 258; *Augustine* v. *Town of Brant,* 249 N. Y. 198.

Since that decision, taxpayers are placing emphasis on the use by this Court of the words "normal" and "usual." It is argued that in employing these words this Court has rejected the strictly narrow application of the doctrine of immunity established in prior decisions and has recognized the applicability of the rule of immunity in a broader field of state activity. See *Commissioner* v. *Ten Eyck, supra.* Thus it is said that the ownership and operation by local governments of waterworks and like utilities have become normal and usual, not only in the several States but throughout the world. See *Brush* v. *Commissioner, supra.*

However, we believe that there was no intent in the *Powers* case to employ the word "usual" in a sense different from the words "ordinary" and "strictly" used in *South Carolina* v. *United States,* 199 U. S. 437, 451, 461, or the word "essential" used in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172. This seems evident from the citation and approval in the *Powers* case (p. 225), of the *Stone Tracy Co.* and *South Carolina* cases. Nor do we think that this Court intended to extend immunity to any new business ventures of the States, at the expense of Federal revenues, merely because States generally have entered those fields.

This belief is strengthened by the more recent decision of this Court in *United States* v. *Cali-*

fornia, 297 U. S. 175. There, in speaking of the rule of immunity, the Court said (pp. 184–185):

> Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 522–524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation *traditionally* within it. *Helvering* v. *Powers*, 293 U. S. 214, 225; *Ohio* v. *Helvering*, 292 U. S. 360; *South Carolina* v. *United States*, 199 U. S. 437; see *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina* v. *United States*, *supra*. Hence we look to the activities in which the states have *traditionally* engaged as marking the boundary of the restriction upon the federal taxing power. * * * [Italics supplied.]

It is the position of the Government that should the Court reject the stricter rule advocated by the Court of Claims, the "traditional" test above outlined should be preferred. This test conforms to principles heretofore established by this Court. It would grant immunity to a wide range of state functions and at the same time would prevent the extension of state activity into new fields at the expense of the Federal revenues. While there will still be difficulty, in particular cases, in determining when a particular activity is traditional, still, on the whole, this test is as satisfactory and as definite as any we are likely to find.

Should this test be applied, the instant case should be remanded to the court below for further findings. Traditionally, the care of the poor, the indigent sick and infirm, including the indigent insane, is a proper function of government. While such care is not "strictly governmental" in the sense understood by the court below, it is an activity in which the States have traditionally engaged. While originally deemed the function of the Church alone, provision for the relief of the poor had been adopted by the English legislature as early as 1535 (27 Hen. 8, c. 25), while the monasteries were yet standing. Long prior to the adoption of our Constitution, poor relief had become a recognized duty of the state. 1 Hallam, Constitutional History of England (1854 Ed.), p. 80. In the colonies, relief for the poor, including the maintenance of alms houses, work houses, and the like, was recognized as one of the functions of government. Cf. *Foster* v. *Worcester,* 33 Mass. (16 Pick.) 71.[3] But while care for the indigent insane, including free hospitalization, may well be regarded as, traditionally, a state activity, it is clearly not, traditionally, the state function to maintain hospitals for paying patients in competition with private hospitals. Charitable hospitals

[3] It should be observed that the Boston State Hospital is not a place for the confinement of the criminally insane, but a place for the care and treatment of the mentally deranged. It is not different from a tuberculosis hospital or a general hospital maintained and operated by the State. (R. 21.)

maintained by the State should be exempt; non-charitable hospitals should not. Of course, a charitable hospital is not rendered non-charitable merely because a few patients pay. Neither is a hospital rendered charitable merely because a few charity patients are accommodated. And this should be true, even though the hospital is not operated for profit, and the patients are charged only enough to defray operating costs, because where a State operates a hospital, open to all patients alike, to the extent that it furnishes facilities to those able to pay, it operates in direct competition with similar private institutions, and to that extent, it exceeds its traditional activities and enters the field traditionally reserved for Federal taxation. Of course, it may be difficult to draw the line between the charitable and non-charitable. But it seems to us that for the rule of immunity to apply, it must appear that the hospital is maintained and operated primarily and principally for the benefit of the indigent sick or insane. If, to a large and substantial degree, it receives paying patients, and is, in fact, a competitor with private institutions, then it should lose its cloak of immunity. This has been the position of the Treasury Department on the subject. I. T. 2357, VI–1 Cumulative Bulletin 52; Mim. 3838, IX–2 Cumulative Bulletin 137; G. C. M. 10814, XI–2 Cumulative Bulletin 113.

The record in this case shows that "in the Boston State Hospital, patients pay if they are able,

but if not pay nothing." (R. 21–22.) The extent of the non-charitable function is not shown.

It would seem, therefore, that should the Court hold that the tax does directly burden the transaction with the State, and should it reject the strict test of governmental function adopted by the court below, then it should remand the case with instruction to determine the extent of the non-charitable functions performed by the hospital, and if the court below should find that these are so substantial as, in fact, to render the hospital a competitor with private institutions operated for profit, then it should be instructed to hold that the activity is non-governmental, but if it should find that it is operated primarily and principally for the care of the indigent insane and the care of paying patients is only incidental, then it should be instructed to hold that the activity is governmental and immune from Federal taxation.

Should the Court, for any reason, rule against the Government, then, of course, only one of the parties petitioner can recover judgment. This is a case for the recovery of taxes alleged to have been overpaid. The tax is imposed upon the Liggett and Myers Tobacco Company. That company is the only party recognized by the statutes dealing with refund claims and suits to recover. Any judgment against the Government should, there-

fore, be in favor of Liggett and Myers. *Indian Motocycle* v. *United States, supra; Panhandle Oil Co.* v. *Knox, supra; Builders' Club of Chicago* v. *United States,* 14 F. Supp. 1020 (C. Cls.). Serious administrative difficulties might arise if parties other than the taxpayer were permitted to file claims and bring suit.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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NOVEMBER 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 401. (a) Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal-revenue taxes now imposed thereon by section 401 of the Revenue Act of 1924, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. (U. S. C., Title 26, Secs. 700–701.)

SEC. 1101. The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act. (U. S. C., Title 26, Secs. 1049, 1350, 1691.)

Treasury Regulations No. 8 (1928 Ed.):

ART. 43. *Rates of tax on tobacco and snuff—Date effective—When tax accrues.*— The rate of tax on tobacco and snuff now in force is 18 cents per pound. The rate is the same as under the Revenue Acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the Revenue Act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut, Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode

of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse scraps, clippings, cuttings, etc., are, however, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

ART. 52. *Mode of affixing tobacco and snuff stamps.*—Each package containing a statutory quantity of tobacco or snuff (see article 45) shall, before removal from the bonded factory premises where made, have affixed thereto the proper internal-revenue stamps or stamps of such denomination as will cover fully the tax on the net weight of the contents. Tobacco stamps must be used only on packages of tobacco, and snuff stamps only on packages of snuff. Such stamps cannot be used interchangeably.

* * * * *

ART. 57. *Manufacture on commission or shares, or from material furnished by another person.*—Whenever tobacco or snuff of any description is manufactured, in whole or in part, upon commission or shares, or the material from which any such articles are made, or are to be made, is furnished by

one person and made and manufactured by another, or the material is furnished or sold by one person with an understanding or agreement with another that the manufactured article is to be received in payment therefor or for any part thereof, the stamps required by law shall be affixed by the actual maker or manufacturer before the article passes from the place of making or manufacturing. And in case of fraud on the part of either of said persons in respect to said manufacture, or of any collusion on their part with intent to defraud the revenue, such material and manufactured articles shall be forfeited to the United States; and each party to such fraud or collusion shall be deemed guilty of a misdemeanor, and be fined not less than $100 nor more than $5,000 and imprisoned for not less than six months nor more than three years. (Sec. 3370, R. S.)

ART. 94. *Temporarily closing factory.*—No manufacturer of tobacco, snuff, cigars, or cigarettes will be permitted to close his factory with material or finished product unstamped on hand. Though manufacturing has been discontinued, the manufacturer will continue to render return on Form 62 or 72, as the case may be, each month, and inventory on Form 70a or 70b, as the case may be, annually to the collector until disposition of the material and manufactured stock is regularly reported, and closing inventory showing nothing on hand is filed, or factory is transferred to successor or to another district as provided in articles 95 and 97, respectively.

ART. 122. *Deficiencies found by examining officers.*—Whenever a deputy collector or other internal revenue officer or agent in

examining a cigar or tobacco factory finds that manufactured products have apparently been removed from the place of manufacture unstamped, or without the proper tax due thereon having been paid, or that there are deficiencies in the manufacturer's production or stamp accounts, he will require the proper entries to be made in the manufacturer's revenue book, showing the deficiency, and report at once the facts and the amount of such omitted tax ascertained by him to the collector. * * *

ART. 152. *Penalty for removal of products from factory not properly packed and stamped.*—(a) Every person who removes from any manufactory, or from any place where tobacco or snuff is made, any manufactured tobacco or snuff without the same being put up in proper packages, or without the proper stamp for the amount of tax thereon being affixed and canceled as required by law; or if the same be intended for export, without the proper export stamp being affixed; shall for each such offense, respectively, be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than two years. (Sec. 3374, R. S.)

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